

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

RON FOSTER, MARKETING & PLANNING :
SPECIALISTS LIMITED PARTNERSHIP, :
and FOSTER FARMS, LLC, : CIVIL ACTION
Plaintiffs and Counterclaim :
Defendants, : NO. 2:14-cv-16744
:
-vs- :
:
UNITED STATES ENVIRONMENTAL :
PROTECTION AGENCY and :
SCOTT PRUITT, in his official :
capacity as Administrator, :
Defendants and Counterclaim :
Plaintiffs. :

x BENCH TRIAL DAY 1

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN T. COPENHAVER, JR.
UNITED STATES DISTRICT JUDGE
AUGUST 14, 2017

APPEARANCES:

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DEFENDANT'S
WITNESSES

DIRECT

CROSS

REDIRECT

RECROSS

EXAMINATION

STEPHANIE ANDREESCU (Videotaped deposition played.)

PLAINTIFFS'
WITNESSES

DIRECT

CROSS

REDIRECT

RECROSS

EXAMINATION

(NONE)

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DEFENDANT'S
EXHIBITS

ADMITTED

None

PLAINTIFFS'
EXHIBITS

ADMITTED

None

1 P-R-O-C-E-E-D-I-N-G-S 9:33 a.m.

2 THE CLERK: All rise.

3 THE COURT: Good morning. Please be seated.

4 THE CLERK: The case before the Court is *Ron*
5 *Foster, Marketing & Planning Specialists Limited*
6 *Partnership, and Foster Farms, LLC, plaintiffs, versus*
7 *United States Environmental Protection Agency, et al.,*
8 Case Number 2:14-cv-16744.

9 Will counsel please note their appearance for the
10 record.

11 MR. WILKINSON: J. C. Max Wilkinson for the
12 plaintiffs, Your Honor. And also James Crockett. Sorry.

13 THE COURT: Thank you.

14 MS. BROWN: Good morning, Your Honor. Laura Brown
15 on behalf of the United States. With me at counsel table is
16 Sonya Shea for the United States; Stefania Shamet, who is
17 Assistant Regional Counsel for EPA, but who has been
18 appointed as special U.S. -- Assistant U.S Attorney for this
19 case, and Kent Hanson from the Department of Justice.

20 THE COURT: Thank you.

21 The Court would normally ask if you're ready for trial,
22 but an e-mail was received over the weekend indicating that
23 you wanted one matter cleared up and possibly time to
24 discuss settlement.

25 Do I understand that correctly?

1 MS. BROWN: Yes, Your Honor. Given that we
2 received the opinion on Friday evening. The parties have
3 reviewed it. We have one question regarding the actual
4 status of the claims that are pending. And then the parties
5 would also like the opportunity to discuss settlement, given
6 the decision that was made on Friday.

7 THE COURT: Thank you.

8 And is that the plaintiffs' position, as well?

9 MR. WILKINSON: Yes, Your Honor. We -- we have a
10 discrepancy between us in terms of what the scope of the
11 issues are that need to be tried today.

12 THE COURT: The issue that was raised in the
13 e-mail has to do with the status of R1, R2, and R3 in the
14 trial of this matter. The Court, in determining that the
15 administrative compliance order was wanting in support for
16 the position that it took on R1, 2, and 3, granted
17 plaintiffs' motion for summary judgment.

18 That, however, of course, was not intended to foreclose
19 the consideration of R1, 2, and 3, as well as 4, on the
20 counterclaim.

21 And as a consequence, all are in play for that purpose.

22 Does that answer the question that the parties have?

23 MS. BROWN: Yes, Your Honor. Thank you.

24 MR. WILKINSON: Would Your Honor be willing to
25 hear an argument as to why we're confused by that?

1 THE COURT: The Court's already ruled.

2 MR. WILKINSON: Yes, sir.

3 THE COURT: Let me ask whether or not you have
4 anything further on that point, and, if not, whether or not
5 you wish to be heard on the question of a brief continuance?

6 MR. WILKINSON: Your Honor, the plaintiffs would
7 ask -- when you say that 1, 2, and 3 are still in play in
8 terms of the presentation of evidence, is that for the --
9 for the ascertaining of what -- whether or not RR4 is
10 jurisdictional only, or are they going to be able to get a
11 second bite at the apple to say that 1, 2, and 3 are also
12 jurisdictional and, therefore, were impacted by the
13 activity?

14 THE COURT: As I mentioned, it's all in play.

15 MR. WILKINSON: Yes, sir.

16 MS. BROWN: Your Honor, at this time, we, as
17 counterclaim plaintiffs now, would request a continuance.
18 I would also just like to clarify that the United States
19 will, since it has the burden, be beginning the trial with
20 its opening statements once we begin after the continuance.

21 THE COURT: Yes.

22 And I think the parties at our pretrial conference were
23 allotted 40 minutes a side. Is that what we finally came
24 to?

25 MS. BROWN: That's correct, Your Honor.

1 MR. WILKINSON: Yes, Your Honor.

2 THE COURT: I don't know whether or not the
3 Court's rulings may have permitted you to limit that, but at
4 least keep it no longer than 40 minutes.

5 Now then, what's the status of the pretrial order?

6 MS. BROWN: It was filed approximately 10 minutes
7 ago, Your Honor. I apologize for the delay.

8 THE COURT: Very good.

9 MR. WILKINSON: Your Honor, just one note on that.
10 I thought that I had inadvertently deleted one exhibit,
11 Number 136, but I didn't get the word to Laura in time for
12 that to be captured on the Order, and I'd just like to note
13 for the record that we would still like to have Exhibit 136
14 available.

15 THE COURT: Any objection?

16 MS. BROWN: No objection, Your Honor.

17 THE COURT: All right. Let me ask what period of
18 time the parties are requesting in order to conclude
19 settlement discussion?

20 MR. WILKINSON: One moment, Your Honor.

21 THE COURT: Certainly.

22 (An off-the-record discussion was held between Attorney
23 Max Wilkinson, Attorney James Crockett, and Mr. Ron Foster.)

24 THE COURT: Let me ask whether or not you want to
25 recess for about 10 minutes while you talk about this?

1 I don't mean to rush you. I'm just asking you if you
2 would like a bit more time?

3 MR. WILKINSON: Yes, Your Honor. We appreciate
4 that.

5 THE COURT: We'll be in recess for 10 minutes.

6 THE CLERK: All rise.

7 (A recess was taken from 9:42 a.m. until 10:30 a.m.)

8 (Trial resumed.)

9 THE CLERK: All rise.

10 THE COURT: Please be seated.

11 Are the parties ready for trial?

12 MS. BROWN: The United States is, Your Honor.

13 MR. WILKINSON: The plaintiffs are ready, Your
14 Honor.

15 THE COURT: You may proceed.

16 MS. SHEA: Good morning.

17 May it please the Court, my name is Sonya Shea, and I
18 represent the United States of America.

19 MS. BROWN: Excuse me, Your Honor.

20 MS. SHEA: Oh, the screen on the --

21 (Interruption in the proceedings.)

22 THE CLERK: Did that work?

23 MS. SHEA: Only one element of the United States'
24 enforcement claim is in dispute. Mr. Foster and his
25 companies do not dispute that they are persons within the

1 meaning of the Clean Water Act. They do not dispute that
2 they discharged pollutants from the point source when their
3 contractor used heavy equipment to bury stream channels on
4 the site. They do not dispute that they did not have a
5 Clean Water Act Section 404 permit to conduct the work on
6 the site.

7 One primary question remains: Are the streams that Mr.
8 Foster and his companies buried waters of the United States?

9 The evidence will show that those streams are waters of
10 the United States within the protection of the Clean Water
11 Act.

12 Mr. Foster did not seek the answer to this question
13 before he placed 100,000 cubic yards of dirt, rock, and
14 other fill material onto a portion of the Neal Run Crossing
15 property, the portion known as Pad 4.

16 The fill material covered 1,970 linear feet of streams.
17 These streams have various designations, but I will refer to
18 them as Relevant Reaches 1, 2, 3, and 4.

19 Relevant Reaches 2 and 3, on the screen here, join
20 together to form the upper extent of Relevant Reach 4.

21 THE COURT: Just one moment. It's not on my
22 screen.

23 (Interruption in the proceedings.)

24 THE COURT: Please proceed.

25 MS. SHEA: Relevant Reaches 2 and 3 join together

1 to form the upper extent of Relevant Reach 4.

2 From there, Relevant Reach 4 continues downstream where
3 Relevant Reach 1 joins in. Then water containing Relevant
4 Reaches 1, 2, and 3, now in Relevant Reach 4, continue
5 across the property boundary of the Neal Run Crossing
6 property site and into a neighbor's hayfield.

7 From there, the water continues into the first unnamed
8 tributary to Neal Run.

9 Then the water flows into the second unnamed tributary
10 to Neal Run; then into Neal Run itself.

11 Neal Run continues to the junction of the Little
12 Kanawha, which is near where it joins into the Ohio River,
13 near Parkersburg.

14 From the navigable portion of Neal Run, to the point
15 where Relevant Reach 4 joins into the first unnamed
16 tributary to Neal Run, also known as the Blackwell
17 Tributary, is about three miles.

18 The character of the site's streams and their important
19 connections with and contributions to downstream
20 traditionally navigable waters will be described by our
21 witnesses.

22 Stephanie Andreescu and Todd Lutte, both EPA Section
23 404 inspectors and scientists, first visited the site on
24 September 9, 2010.

25 They were there to check out violations in the first

1 unnamed tributary to Neal Run, also known as the Blackwell
2 Tributary by the site's previous owner Endurance Group, near
3 the Pad 1 of the site.

4 Endurance Group had declared bankruptcy and EPA had
5 preserved its claim in the bankruptcy proceedings.

6 When Mr. Foster had purchased the property, he had
7 promised the bankruptcy court that he would allow the
8 disturbed channel of Blackwell Tributary to be remediated
9 and would set aside funds for the restoration.

10 During EPA's inspection of the Blackwell Tributary, Ms.
11 Andreescu and Mr. Lutte saw a sign, a billboard, showing
12 development plans for the five pads on the Neal Run Crossing
13 property. The signs suggested that the stream on Pad 4 --
14 streams on Pad 4 would be filled and that those streams
15 could be covered by the Clean Water Act.

16 So they decided to investigate further.

17 Ms. Andreescu and Mr. Lutte followed Blackwell
18 Tributary upstream. They crossed the neighbor's hayfield
19 where they saw the Pad 4 area which had recently been
20 disturbed. Trees and brush had been ripped out, and dirt,
21 rock, and other debris had been spread about the site.

22 Ms. Andreescu and Mr. Lutte observed the stream, which
23 they later confirmed was Relevant Reach 4, was partially
24 buried by the fill. Ms. Andreescu and Mr. Lutte spoke with
25 Mr. Foster's contractor, Dave Walters, of Walters

1 Excavating, who was conducting the work on the site. They
2 told him that, based on their observations, a permit was
3 likely required for work in the stream.

4 Mr. Walters then called Dan Metheny of Fox Engineering,
5 who notified Mr. Foster of EPA's belief that the streams on
6 the site were covered by the Clean Water Act.

7 Mr. Metheny also provided Mr. Foster with information
8 on Clean Water Act Section 404 permits.

9 After EPA's initial site visit, Mr. Foster did not seek
10 an official determination from EPA or the Corps. He did not
11 contact EPA or the Corps, and he did not seek the advice
12 from someone qualified to determine whether the waters on
13 the site might be covered by the Clean Water Act.

14 He proceeded to continue development work until late
15 November of 2010.

16 Mr. Foster constructed a sediment basin over part of
17 Relevant Reach 4 buried channel, near the western edge of
18 the property.

19 Truckload after truckload of fill material was dumped
20 out and spread over Pad 4, covering the site in at least
21 100,000 cubic yards of fill. That's the equivalent of more
22 than 900 railcars.

23 After EPA started its investigation, Mr. Foster hired
24 Jacob White, of Randolph Engineering, to conduct a
25 delineation report of the streams on the property.

1 Mr. White blocked the unfilled upper reaches of RR2 and
2 Relevant Reaches 2 and 3 and documented their extent.

3 Mr. White also confirmed the previous locations of the
4 buried stream channels on the site based on his
5 interpretations of topographic maps. He concluded that the
6 streams on Pad 4 were likely covered by the Clean Water Act.
7 And Mr. White stated that conclusion in a report which he
8 forwarded to Mr. Foster.

9 Rick Hemann, an Army Corps of engineer employee
10 responsible for making jurisdictional determinations, came
11 to the site on June 2011. He was there to evaluate the
12 delineations in the Randolph Engineering report.

13 Mr. Hemann also concluded that the fill material had
14 been placed into waters of the United States.

15 The fact that water flows from the streams, from the
16 site's streams to the Blackwell Tributary and then to
17 navigable waters is not disputed. There is a hydrological
18 connection.

19 What is disputed is the significance of the connection
20 between the site's streams and the traditionally navigable
21 waters.

22 Mr. Foster and his companies assert that a change in
23 the physical characteristics of the Relevant Reach 4 for
24 about 120 feet as it flows through the neighbor's hayfield
25 means that the site's streams are not sufficiently connected

1 to the downstream waters to be covered by the Clean Water
2 Act.

3 It is true that one indicator EPA looks for in
4 determining whether waters are covered by the Clean Water
5 Act is the presence of a bed, bank, and ordinary high water
6 mark. An ordinary high water mark is a line in the stream's
7 channel that indicates where water normally flows.

8 And we do not dispute that Relevant Reach 4's bed,
9 bank, and ordinary high water mark are not as clearly
10 defined within the 120-foot stretch as it traverses the
11 hayfield. But the absence of those features does not
12 automatically mean that the stream is not covered by the
13 Clean Water Act.

14 There is no requirement that the features be continuous
15 for the entire length of the stream as it flows to navigable
16 waters.

17 In fact, Corps guidance instructs that evaluators
18 should look above and below a break in such features to see
19 if those features are reestablished.

20 In our case, Relevant Reach 4 assesses such features
21 for the majority of its length in the hayfield, including
22 any upstream portions near the fill.

23 And the evidence will show that the connection between
24 the site's streams and the traditionally downstream
25 navigable waters is sufficient to qualify the stream as

1 waters of the United States.

2 You will hear from Peter Stokely, an expert in aerial
3 photography and interpretation, who observed the physical
4 connection of Relevant Reaches to traditionally navigable
5 waters in photographs dating as far as back as 1968.

6 His findings are consistent with the observations of
7 Mr. Foster's expert, Dane Pehrman, who went into the
8 hayfield and found flowing water throughout the length of
9 Relevant Reach 4, And Larry Carr, the previous owner of the
10 hayfield, who observed flowing water across the hayfield
11 from late winter to early spring.

12 The connection is more than hydrological.

13 Experts in hydrology and biology, Doctors Charlie Dow
14 and David Arscott confirm the important contributions that
15 streams like Relevant Reaches 1, 2, 3, and 4 have on
16 downstream traditionally navigable waters.

17 They will describe their analysis of the topographic
18 features and watershed areas of the filled streams to
19 determine stream characteristics that likely existed before
20 those streams were buried.

21 Doctors Arscott and Dow collected a variety of
22 life-forms living in the undisturbed upper reaches of
23 Relevant Reaches 2 and 3, such as mayflies, crayfish, and
24 flatworms.

25 By understanding the lifecycles of these life-forms,

1 and their need to be submerged in water for many months of
2 the year, Doctors Arscott and Dow concluded that Relevant
3 Reach 2, whose upper extent is pictured on the screen now,
4 likely held water for at least four- to- eight months of the
5 year; and that Relevant Reach 3, whose upper extent is on
6 the screen, was likely ephemeral.

7 By studying 19 reference streams with similar
8 topographic features and watershed areas, both on and off
9 Mr. Foster's property, Doctors Arscott and Dow concluded
10 that, prior to the disturbance, Relevant Reach 4 likely
11 flowed for four- to- eight months of the year.

12 Doctors Arscott and Dow will detail their chemical
13 sampling of the water in the unfilled upper reaches of
14 Relevant Reaches 2 and 3, as well as the water in the
15 referenced stream, in the Blackwell Tributary, and the
16 second unnamed tributary to Neal Run, and Neal Run.

17 The chemistry of the waters from Relevant Reaches 2 and
18 3 was comparable to the undisturbed referenced headwater
19 streams.

20 Doctors Arscott and Dow compared -- or confirmed that
21 the Relevant Reaches 2 and 3 had a chemical composition that
22 was distinct from rainwater, meaning that the water had been
23 in those channels long enough to accumulate minerals and
24 nutrients.

25 Therefore, Doctors Arscott and Dow concluded that

1 Relevant Reaches 2 and 3 were headwater streams, which are
2 the kind of streams that have important contributions to
3 traditionally navigable waters.

4 Doctors Arscott and Dow also measured the water
5 emerging from the fill near where Relevant Reach 4's channel
6 was buried.

7 That water had higher conductivity, meaning that it
8 contained more salts, which was caused by the water flowing
9 through the fill materials.

10 Doctors Arscott and Dow's chemical and biological
11 analysis is undisputed.

12 Your Honor, after hearing the evidence, only one
13 conclusion can be drawn: That the streams on Pad 4 are
14 waters of the United States, within the meaning of the Clean
15 Water Act.

16 Once liability of Mr. Foster and his companies is
17 established, then the question becomes what remedy is
18 appropriate in this case.

19 The remedy should include both injunctive and civil
20 penalties. The injunctive relief should fairly compensate
21 for the loss and destruction that Mr. Foster caused to the
22 waters of the United States.

23 Usually the United States would seek remediation of the
24 streams that were destroyed, but, in this case, because of
25 the large volume of fill that was placed on the site,

1 remediation would likely not be feasible.

2 So, instead, the United States is seeking compensatory
3 mitigation. Compensatory mitigation involves either
4 restoring, preserving, or creating streams offsite.

5 You will hear testimony about the various forms of
6 compensatory mitigation available. And compensatory
7 mitigation would have been required had Mr. Foster received
8 a Section 404 permit from the Army Corps of Engineers for
9 his activities.

10 Allowing Mr. Foster to escape that responsibility by
11 violating the law would be unfair to persons who comply with
12 it by getting permits.

13 The civil penalties should be large enough to
14 sufficiently punish Mr. Foster and his companies for the
15 violation, while also serving to deter other violators of
16 the Clean Water Act.

17 The penalty amount should be determined by considering
18 the factors listed in Section 309(d) of the Clean Water Act.

19 The penalty amount should take into account Mr.
20 Foster's finances. Mr. Foster himself is worth about
21 \$13,000, and each of his companies is worth about \$2
22 million.

23 THE COURT: You may want to correct that figure.
24 You may want to restate the figure.

25 MS. SHEA: Mr. Foster himself is worth about

1 \$13 million -- I'm sorry, Your Honor, yes -- and each of his
2 companies is worth about \$2 million.

3 THE COURT: Yes, ma'am.

4 MS. SHEA: Neither Mr. Foster nor his companies
5 have asserted that they would be unable to pay civil
6 penalties.

7 Another factor to establish the penalty amount is Mr.
8 Foster's knowledge and willfulness in the violating of the
9 Clean Water Act, especially given that Mr. Foster purchased
10 the property knowing that he would be working to remediate
11 legacy Clean Water Act violations. And Mr. Foster knew that
12 EPA considered the Pad 4 streams to be covered by the Clean
13 Water Act as early as September of 2010. But Mr. Foster did
14 not seek to determine whether the streams were covered by
15 the Clean Water Act at that time.

16 He continued to place more rock, dirt, and other fill
17 materials on the site, burying more streams.

18 The extent of the violation is another factor in
19 assessing penalty. And here the violation is quite
20 extensive, covering 1,970 linear feet of streams, which is
21 the equivalent of about six and a half football fields .

22 Your Honor, we will show that the streams that Mr.
23 Foster and his companies buried on the site are waters of
24 the United States, within the jurisdiction of the Clean
25 Water Act.

1 THE COURT: Thank you.

2 MS. SHEA: Thank you.

3 THE COURT: Mr. Wilkinson, are you and Mr.
4 Crockett going to present?

5 MR. WILKINSON: Yes, Your Honor.

6 THE COURT: Please come ahead.

7 MR. WILKINSON: May it please the Court. Good
8 morning, Your Honor. My name is J. C. Max Wikinson. I am
9 counsel for the plaintiff, Ronald Foster, and his companies,
10 Foster Farms, LLC, and Marketing & Planning Specialists, LP.

11 In light of an 82-page opinion, there is obviously no
12 need to go over in detail most of the background facts. And
13 we would agree that there is largely not a dispute over
14 many of the facts; however, the issue is -- we would dispute
15 that there is -- there was a discharge of pollutants.

16 We would dispute any aspect of what the activities on
17 the site that were conducted, meaning under the Clean Water
18 Act, because all of that hinges on the key issue here, which
19 is whether or not the Pad 4 area in question is or is not a
20 jurisdictional water of the United States.

21 EPA has the burden of proof in this case for
22 establishing the jurisdictional nature of -- the alleged
23 jurisdictional nature of these areas.

24 And the appropriate regulatory criteria is, again,
25 whether or not there is an absence of a bed, bank, and

1 ordinary high water mark. Because as you move upgradient
2 upstream from the traditional navigable water, per the
3 regulatory guidance, once that disappears, it is to -- it
4 cuts off the jurisdiction under the Clean Water Act, unless,
5 as the plaintiffs have -- or the government has submitted,
6 you can show that there is actual flow that continues in
7 this break or the discontinuity.

8 We will show that that is not the case. And that that
9 is not the case, neither because there is some kind of
10 subterranean fluid dynamics going on or that there is any
11 agriculture activity that has been the cause of this
12 discontinuity in the hayfield.

13 The remaining issues are really at the root, what is
14 the nature of RR4, Your Honor. And the issue, here again,
15 is the hayfield.

16 As Ms. Shea pointed out, this is the location of --
17 this is the general location that we're talking about here.
18 This is the hayfield, the Pad 4 area (indicating.)

19 This area has been a hayfield for as long as every
20 witness that is in play here can remember. And our
21 witnesses go back to 1952. This image here is one of
22 defendant -- or now -- well, the Government's Exhibit 323,
23 this is a superimposition of RR2, 3, and 4 onto that prior
24 image.

25 And for whatever reason, they've left off RR1, which

1 would be, roughly, in this vicinity (indicating.)

2 Our position here, Your Honor, is that there simply is
3 not Clean Water Act jurisdiction here. And it is because,
4 contrary to the claims of the government in this matter,
5 water does not flow seasonally for any duration of time in
6 either RR1, 2, or 3, or even 4.

7 And we will hear testimony, again, going back to 1952,
8 you'll hear from Mr. Doug Hatfield, who has lived in the
9 vicinity since the 1990s; Mr. Carr, who has lived on and
10 owned the property of the hayfield since the 1960s; and Mr.
11 Larry George, who lived in the vicinity and would often go
12 onto the property back in -- from 1952 forward.

13 You'll hear from Mr. Foster, who has been on the
14 property many times since 2010.

15 You'll hear deposition testimony that will be submitted
16 on Ms. Jayme Fuller from GAI, who was out on the site in
17 2013.

18 And you'll hear from our own expert, Dane Pehrman, who
19 was out on the site in 2015.

20 The fundamental crux issue here, we would contend and
21 we would agree with, is what is the nature of -- what does
22 the break in the bed, bank, and ordinary high water mark in
23 the hayfield mean for this case?

24 They have submitted in their briefs, and as noted in
25 your Order, that a natural or manmade discontinuity does not

1 necessarily sever jurisdiction, based on, one, either
2 temporary flow underground, or, two, that the bed, bank, and
3 ordinary high water mark has been removed by development or
4 agricultural activities.

5 We are going to be able to show you, Your Honor, that
6 this contention that water briefly flows subsurface in the
7 hayfield is simply not true. There is no witness for either
8 party that will testify that that is -- that they can
9 testify that this is, in fact, happening.

10 In fact, Ms. Fuller, who was the author of the GAI
11 report, who Ms. Brown deposed back in 2015 to go over the
12 GAI report, stated -- she is the only person that ever went
13 out and looked for it and testified in her deposition, even
14 though water was flowing out of the discharge pipe at the
15 Pad 4 sediment pond into the field, it rapidly disappeared.
16 And then that she dug test pits to look for groundwater, and
17 it wasn't there -- or underground -- or subterranean flow,
18 and it was not there. And there wasn't even groundwater
19 percolating in those test pits.

20 So this, again, simply reiterates that what is at issue
21 here is not a -- some kind of karst topography in which a
22 surface flow hits a discontinuity that allows it to actually
23 flow in a fluid manner underground and it pops back up and
24 comes out at the west end of the hayfield.

25 The soil characteristics of this hayfield are such

1 that, and the elevation differential are such that, when --
2 whenever water comes out of the Pad 4 area, out of 1, 2, 3,
3 4, and hits the hayfield, it just simply dissipates into
4 that soil characteristic like a giant sponge, in all but the
5 most infrequent and episodic high precipitation events. And
6 that's exactly what the people who have lived there since
7 the 19 -- some since the 1950s are going to testify here
8 today or during this trial.

9 Now, so what does that mean with regard to -- from the
10 standpoint of the applicability of -- or the government's
11 approach in this matter?

12 Well, the government's own -- well, let me back up.

13 There is another factor here that plays into this.

14 As the government contended here and put forth in their
15 opening statement, you have to have a bed, bank, and
16 ordinary high water mark for this channel to be considered
17 jurisdictional.

18 Now, we would submit that one of the key factors of
19 the -- of the hayfield is the hay, unsurprisingly, because
20 it clearly shows that even at the west end of the hayfield,
21 which is down here -- this is the Pad 4 area -- (indicating)
22 -- sorry -- here's -- this is high tech -- this is the
23 western end of the hayfield (indicating).

24 This is the Pad 4 area, this is the berm where the
25 sediment pond in the Pad 4 area is located (indicating.)

1 Now, this picture was taken by EPA in 2011. As you can
2 see, this westernmost reach of the hayfield is completely
3 covered with vegetation in this area where they contend is a
4 stream.

5 Now, there is absolutely no visible bed, bank, or
6 ordinary high water mark in this area at all. And this is
7 the westernmost end of that location (indicating.)

8 And EPA's own guidance document from 2010 describes how
9 a bed of a stream is the bottom of the channel and the
10 lateral constraints of the stream banks. As a general rule,
11 the bed is that part of the channel below the normal
12 waterline, and the banks often extend above the waterline.

13 There simply is no observable feature that meets the
14 criteria of their own technical characteristics that they
15 say has to be there to show that this is, in fact, a
16 jurisdictional stream.

17 So to whatever extent anything is going on above the
18 hayfield, it certainly does not reestablish itself in any
19 way that establishes jurisdiction here. And the vegetation,
20 the hay itself supports that.

21 Quite simply, if this drainage behaved in the way that
22 EPA contends that it does, it would have the features that
23 are required to be shown.

24 It does not.

25 And the reason why is because there is not enough

1 drainage area above the hayfield; the hayfield elevation and
2 gradient is so dramatically different; and the hayfield's
3 soil characteristics are so dramatically different, that
4 whenever water does come up as a result of precipitation out
5 of that drainage area where Pad 4 is, it simply disappears
6 and becomes percolating groundwater, which is not
7 jurisdictional under the Clean Water Act.

8 The evidence is that this is, at best, a swale. And,
9 again, this is -- this picture was taken in 2011 by EPA.

10 This is essentially a picture in just about the same
11 location. It's maybe a little bit up into the field. But
12 this picture was taken by Mr. Foster in 2015.

13 There just aren't -- every single picture that you will
14 see of this location on the ground -- now, they can -- Mr.
15 Stokely and EPA's experts, who -- the only expert who they
16 presented to state that there is, in fact, this supposed
17 linear connection on the ground has done all of his
18 assessment by looking at aerial photography, aerial or
19 satellite photography.

20 Well, there is all kinds of things that can be looked
21 at from the air from a distance of several hundred to
22 several thousand feet, but you have to actually get down on
23 the ground to see if what you think you see from the air is
24 what you think it is. And the simple fact of the matter is
25 is that every piece of photographic evidence on the ground

1 shows that there is no bed, bank, and ordinary high water
2 mark. We would contend, not only from the place where it
3 disappears in just the center of the field, but also on the
4 far end. There is a little bit of an erosional divot there
5 that has formed over the -- who knows how many years. You
6 know, the Appalachian Plateau is somewhere between 300 and
7 500 million years old.

8 So everything that's in that field was at one point in
9 time part of the mountain where the Pad 4 area is now. But,
10 certainly, there's nothing that indicates that that flow is
11 scouring across there in any way, shape, or form, like they
12 have claimed. Because if it was, it simply would have those
13 characteristics.

14 It does not.

15 THE COURT: Let me ask, at what point is it agreed
16 that the water in the first unnamed tributary, also known as
17 Blackwell Creek, begins to flow? And for what period of a
18 year? Is there any agreement between the parties on that
19 matter?

20 MR. WILKINSON: I don't know that we've discussed
21 that, Your Honor, in any detail.

22 THE COURT: Well, water starts flowing at some
23 point. You have to know where that is.

24 And so what I'm asking you is, where is it?

25 MR. WILKINSON: It's absolutely above RR4, I will

1 tell you that. And there's testimony from -- in Ms.
2 Fuller's deposition where she -- Ms. Brown asked her in
3 deposition -- well, she said, in Ms. Fuller's deposition,
4 she stated, "When I was out there in 2013, June of 2013,
5 water was flowing out of the decant of the sediment pond
6 into the field. It disappeared into the field."

7 She dug three test pits in the field. No groundwater
8 was found in those test pits.

9 She walked over to the confluence or at least the
10 juncture of where RR4's mouth is with Blackwell Creek and
11 looked in Blackwell Creek, and there was flow in Blackwell
12 Creek.

13 Blackwell Creek's drainage extends way beyond to the
14 south and east of the location of where RR4 is. There is a
15 tremendously much larger amount of drainage area that feeds
16 Blackwell Creek than just RR4.

17 RR4 is an insignificant piece of that drainage for
18 Blackwell Creek, Your Honor.

19 And I believe I talked to Mr. Hemann about that in his
20 deposition, and when he's here as a witness, we can go over
21 that again. But certainly, there is -- if it's the
22 contention, if the contention of EPA -- I've never
23 understood it to be their contention, but if it's the
24 Court's understanding that their contention is that RR4 is
25 the sole feed for flow in Blackwell Creek, there is

1 absolutely no evidence for that. And there is plenty of
2 evidence to the contrary.

3 THE COURT: I don't understand that to be their
4 contention.

5 My question of you is: At what point in relation to
6 RR4 does the water begin to flow? And if it's not
7 year-round, for what period of time?

8 MR. WILKINSON: Oh, well, the testimony of
9 everybody who has been out there and observed this thing
10 over time is that the only time you get any kind of surface
11 flow -- two things are going to happen, Your Honor, there
12 is, if you have a precipitation event in the Pad 4 area in
13 what's RR1, 2, 3, and the beginning of RR4, you will -- you
14 know, the testimony is, you'll get some -- if it's just
15 normal rain, you might get a little bit of surface flow; it
16 will come out and it will hit that hayfield and then it
17 disappears and percolates into the hayfield and is gone.

18 Mr. Carr -- all the people who have had extensive
19 experience with the hayfield over the decades state that you
20 will have -- on occasion, you'll have episodes where there
21 is either so much precipitation or snowmelt in a short
22 amount of time that you will get enough saturation where
23 you'll get a little bit of surface flow to go across there,
24 but it might last for 24- to- 48 hours and then it again
25 disappears and dries up. And then that -- then you don't

1 have it again, doesn't matter what season it is, doesn't
2 matter whether it's the wet season or the dry season, you're
3 only going to get that kind of connection across the surface
4 in extremely infrequent and episodic situations, based on --
5 again, based on precipitation, not based on the --

6 THE COURT: Excuse me for the interruption.
7 Please go ahead.

8 MR. WILKINSON: Yes, Your Honor.

9 Again, going back -- so what this means from the
10 standpoint of EPA's own guidance documents, which is another
11 reason why the plaintiffs have been so perplexed and vexed
12 by this entire enforcement proceeding, is that EPA's own
13 guidance document -- guidance documents recognize that there
14 are features in the world called swales.

15 And swales are described as: "Generally shallow
16 features in the landscape that may convey water across
17 upland areas during and following storm events. Swales
18 usually occur on nearly flat slopes and typically have grass
19 or other low-lying vegetation throughout the swale."

20 We would contend that this is a picture of a textbook
21 swale.

22 Now, they do say -- and I misspoke.

23 This is actually guidance document -- this is a
24 guidance document by the Corps. But Corps of Engineers is
25 ordinarily the agent, the proponent agency that deals with

1 404 situations and was involved in this case to begin with.

2 The guidance documents on these matters are generally
3 used interchangeably between the two.

4 Also, the 2008 Rapanos guidance document states
5 expressly that swales or erosional features, for example,
6 gullies, small washes, characterized by low volume,
7 infrequent, or short duration of flow.

8 Again, all of the testimony that you will hear from the
9 people who have known this location say that this is exactly
10 how water flows and water behaves in this -- in this
11 drainage are generally not waters of the United States,
12 because they are not tributaries, or they do not have a
13 significant nexus to downstream traditional navigable
14 waters.

15 So, again -- and Rapanos itself specifically states
16 that a mere hydrologic connection alone is not sufficient to
17 establish Clean Water Act jurisdiction.

18 The plaintiffs have never argued that or contended that
19 there is not a point in time, occasionally, when you have
20 the right precipitation conditions and a sufficient amount
21 of saturation in those transmissive soils in that field to
22 where you'll get a sheet flow, and almost like an oozing of
23 the surface water across that, and it will empty into the
24 Blackwell Creek, but it's incredibly short-lived. And under
25 the definitions under Rapanos, it simply cannot be

1 considered to be significant or substantial. It's, by
2 definition, insignificant and insubstantial.

3 Again, the nature of what led into this is shocking to
4 the degree, as Your Honor noted in your Order, that when EPA
5 went out there and Corps conducted their jurisdictional
6 analysis in the first instance on this thing and came up
7 with the claim that this location was jurisdictional, they
8 did not provide any, any -- the only physical aspect they
9 looked at was the proximity to the traditional navigable
10 water, which the AJDF form, the Approved Jurisdictional
11 Determination Form, itself says you are not to do. They
12 didn't provide any chemical or biological analysis; and yet,
13 they made this claim that this location was jurisdictional.

14 And it had to come in -- now they get to come in after
15 the fact and present, supposedly, all this compelling
16 testimony by Dr. Arscott and Dr. Dow that supposedly proves
17 that this was all along a jurisdictional location.

18 Well, one of the things that Ms. Shea pointed out in
19 her opening was that they went up there in May of 2015 --
20 and we were with them -- and they -- it had rained the
21 previous day, and there was some sampling that was conducted
22 up in 1, 2, and 3, up above the location where the fill
23 activities had taken place.

24 Now, the thing that has to be kept in mind here is the
25 hydrological regime in the Pad 4 area itself has been

1 altered by the construction activities. And there are check
2 dams that impede and retard flow coming out of those
3 drainages, because they're required to as part of their
4 sediment control structure plan.

5 So the nature of how water is even running off in
6 response to precipitation is different than it would have
7 been prior to any of those check dams or structures that
8 slow down and retard flow coming off of the site.

9 We would also contend that the sediment pond itself, by
10 the time that they were out there -- and these structures
11 have all been in place since 2010, when this thing was
12 built. So we're talking about five years that have been in
13 place for a small, different kind of hydrologic ecosystem to
14 develop up there, based on the presence of a standing pond
15 that was never there before, and these check dams that
16 retard flow as it comes down off of the drainages.

17 And that the notion that what they found out there in
18 May of 2015, five years after-the-fact, under substantially
19 different conditions that would have been present under
20 natural circumstances, simply do not meet the criteria for
21 this Court to determine that the, that the 1, 2, and 3, and
22 even 4, are jurisdictional.

23 4 might arguably be jurisdictional if you had that true
24 connection across, across the mouth of the Pad 4 hollow all
25 the way over the Blackwell Creek.

1 It simply does not.

2 And, again, their contention that this water comes out
3 of the surface and somehow dips underground and continues to
4 flow in the nature of the way that a stream would flow and
5 then pops back out is just simply not true.

6 It becomes straight out, classic percolating
7 groundwater. And it must run very deep, because as Ms.
8 Fuller's testimony, which you'll see in the designation --
9 unfortunately, she's moved to Indianapolis, so she was
10 unavailable for this trial -- but it's just simply not
11 there.

12 So in -- let me go over just a few things I'd like to
13 address from her opening.

14 We're not sure where she got the cubic yard number. We
15 would gladly address that during trial, because we're not
16 sure that that's entirely accurate.

17 The notion that EPA, when they came on the site, told
18 the construction representatives that were on the Pad 4 area
19 conducting clearing and grubbing and -- that's another
20 inaccurate statement.

21 Those photos from 2010 do not show -- there was no
22 placement of fill that took place when those photos were
23 taken, even though -- even though Ms. Andreescu in her
24 report and in her deposition contended that there had been
25 fill placed.

1 Clearing and grubbing had just taken place. You have
2 to clear out the vegetation and the trees in order to start
3 your construction activities.

4 So that's one thing that we contend was inaccurate in
5 their presentation.

6 The contention that they were told you needed a permit
7 to do what they were doing is also not true. That is --
8 that is not -- that is not even accurate as to what
9 Andreescu and Mr. Lutte stated in their deposition, and it
10 is not accurate into what Mr. Seth Walters and Mr. David
11 Walters testified in their deposition.

12 They were told, "Well, you may need a permit."

13 And, in response to that, Mr. Foster directed everybody
14 to stand down for three days while his technical consultant,
15 Mr. Metheny, looked into the situation and looked at the
16 location to decide whether or not, well, is this really
17 something that should be considered jurisdictional.

18 Which I think is relevant, also, to the contention
19 that, well, you couldn't -- you can't hold us accountable
20 for not going out there and testing because you had filled
21 the streams before we had a chance to.

22 That's not true.

23 The clearing and grubbing had taken place, but nothing
24 else had taken place.

25 If they felt so strongly about it, that this was,

1 indeed, a violation. And, in fact, the chronology of this
2 indicates that this was a highly questionable and marginal
3 location considered by both agencies by the fact that it
4 took them over a year to determine who was even in charge of
5 this thing, and that the lack of jumping on the opportunity
6 to come out there and test when they were there on site, or
7 shortly thereafter, was never taken.

8 So the lack of the -- they can't pin the lack of
9 movement on this on the plaintiffs, or on Mr. Foster and his
10 companies. It was their own lack of clarity, and their own
11 lack of initiative.

12 Again, she mentioned Mr. Jacob White. I know that you
13 know from the briefings that they relied on his delineation.

14 Mr. White, when he went out there, looked only at the
15 nature of what the ground looked like moving upgradient from
16 the property boundary of Mr. Foster's property.

17 He didn't even look at the hayfield. That was in 2011.

18 When we finally deposed him the summer of 2015 -- and
19 he had never seen this before, none of us had talked to
20 him -- we presented him with the GAI report from 2013.

21 He took a small pause; he read it over. Came back.
22 Went on the record; asked him if that would effect in any
23 way what his conclusion was in 2011.

24 And he absolutely repudiated his contention that he
25 would have found RR1, 2, 3 and 4 jurisdictional.

1 He said, "If I'd taken the time to go back and see what
2 the actual nature of the continuity or lack of continuity
3 between the Pad 4 area and Blackwell Creek was, I would have
4 reached the same conclusion GAI did, that this was not a
5 jurisdictional location."

6 And during Ms. Andreescu's testimony, I presented her
7 with that same prior testimony of Mr. White, and she stated
8 that she had never even -- she had never even been made
9 aware of that fact until that point in time. And that was
10 in July of this year.

11 One moment, Your Honor.

12 Again, I know that Your Honor addressed this in the
13 Order, but we again would state that the -- we agree that it
14 would probably be impossible for Mr. -- or Doctors Dow and
15 Arscott to have found a precise drainage location that is
16 exactly like the Pad 4 area and this hayfield for
17 comparative purposes, but there are almost certainly some.

18 In fact, as you can see in EPA's Exhibit 317, here's
19 another hayfield on the other side of Blackwell Creek --
20 (indicating).

21 Although this one looks like it has a little bit
22 more -- it probably gets a little bit steeper and has a
23 little bit more channelization. But, I mean, there are --
24 the reason why we contend that it was -- the comparisons
25 that they made are not compelling here, is that in all of

1 these other drainages that they looked at, there isn't this
2 change in gradient, change in soil characteristics, change
3 in discontinuity of a surface connection the way that there
4 is at this location. And, therefore, anything that is
5 running out of these other headwaters is going right into a
6 channel with bed, bank, ordinary high water mark, and
7 feeding the higher order streams as it moves downstream to
8 the traditional navigable water.

9 We would also contend that the civil penalty claims
10 that are made -- that were made in the opening are simply
11 not just. There is absolutely no evidence that there was
12 knowledge that this, that this area required a permit on
13 September 9th, 2010. That's not even supported by EPA's own
14 testimony.

15 And we would just simply say that, you know, the extent
16 of the violation that they have claimed, both the linear
17 footage of almost 2,000 feet and cubic yards, however you
18 want to put the metric on it, all of that hinges on whether
19 or not this location is or is not a jurisdictional area.

20 If it's not a Clean Water Act jurisdictional water,
21 then Mr. Foster has done what tens of thousands, probably
22 hundreds of thousands of construction businesses do across
23 this country every day, which is conduct cut and fill
24 operations, or what's also commonly referred to in the
25 construction industry as mass balancing, where you're taking

1 ground that is -- ground that's low one place and high
2 someplace else and leveling it off so that you can do
3 something with it. And that what's he's always wanted to
4 do. And he has been prevented from doing this for seven
5 years.

6 And he tried in good faith to work with these agencies.
7 They couldn't even tell him who was in charge. And he had
8 many times been willing to work on alternate ways to resolve
9 this situation, and hit a brick wall every time, even after
10 he made them aware of the fact that the *Sackett* decision
11 gave him right of appeal.

12 And it took us another -- that was in 2012. It took
13 two years for us to get to the point where we could file
14 this litigation to have a -- finally, have a fair say and
15 opportunity to present our case and Mr. Foster's facts, and
16 the facts as they have been known by people in this area for
17 over 60 years.

18 This is neither RR -- if RR4 is not a water of the
19 United States, then neither are R1, 2, and 3.

20 And we would submit, Your Honor, that the facts are
21 clear, they are indisputable -- and they can dress it up all
22 they want with fancy Ph.D. reports that found mayflies and
23 Caddisflies and flatworms up in an area that happened to be
24 wet the day they were out there -- but it does not change
25 the fact that this location only flows in response to

1 episodic high precipitation events. And even when it does
2 that, most of the time it comes down and hits that soil and
3 gets absorbed and becomes true groundwater.

4 It is not jurisdictional. It never has been
5 jurisdictional.

6 And, frankly, we certainly hope that this Court will
7 rule that it never will be jurisdictional.

8 THE COURT: Thank you.

9 Let me ask whether the government is ready to proceed
10 with its first witness?

11 MS. BROWN: Your Honor, our first witness is
12 Stephanie Andreescu. And I believe we discussed at the
13 pretrial conference that because, I believe she's perhaps
14 having a baby today, that we had videotaped her deposition.
15 And there is a part of it that we would like to play. It is
16 approximately two hours and a half on video.

17 We think because she is one of our key witnesses, it
18 would be best if the Court actually saw her testimony.

19 I know the Court has another engagement. We could
20 begin it now if the Court would like?

21 THE COURT: I think it would be well to get
22 started. How long will it take you to set up?

23 MS. BROWN: We can set up now, Your Honor.

24 THE COURT: Go ahead.

25 (Pause.)

1 MS. BROWN: Your Honor, if I could have permission
2 to approach with the exhibits that will be used?

3 THE COURT: Yes.

4 Is that which you've handed the clerk, two items,
5 one is a copy of the other?

6 MS. BROWN: They are both copies of the same
7 thing. They are the exhibits that she will be looking at
8 during the deposition.

9 THE COURT: Thank you. They're identical, so to
10 speak?

11 MS. BROWN: Yes. And, for the record, Your Honor,
12 at the time of the deposition, the parties had agreed that
13 the documents used, the authentication of the exhibits used,
14 there were a few objections that were preserved.

15 If Your Honor would like, we could pause the video
16 after objections are made if the Court would like to rule
17 then or we could preserve them to the end.

18 THE COURT: I think we should probably take the
19 objections up as the occurrence presents itself and the
20 Court can rule then.

21 MS. BROWN: Thank you, Your Honor.

22 (Videotaped deposition playing of Stephanie Andreescu.)

23 THE COURT: Let's see if we can cut this for a
24 moment.

25 (Videotaped deposition playing paused.)

1 THE COURT: It seems to me that we don't need a
2 lot of detail about what happened on Pad 1. I understand
3 that's the reason that brings the parties there in September
4 of 2010.

5 It has almost nothing to do with that which takes place
6 later.

7 I understand some credibility matters arise out of it,
8 but I don't want us wasting a lot of time listening in
9 detail to what is happening about curing the problem on Pad
10 1 that took place before the Fosters acquired the property.

11 MS. BROWN: Yes, Your Honor. I think this line of
12 testimony ends shortly, and it is used to offer just some
13 prior knowledge of Mr. Foster about how the process works,
14 because he was engaged with Mr. -- with EPA at this time
15 earlier, in 2009.

16 THE COURT: Well, if the parties will, for future
17 witnesses, let's stay away from that which is not really
18 relevant to our case.

19 And please go ahead.

20 MS. BROWN: Thank you, Your Honor.

21 (Videotaped deposition playing resumes.)

22 (Videotaped deposition playing paused.)

23 MR. WILKINSON: I withdraw the objection. Go on.

24 THE COURT: Thank you.

25 MS. BROWN: Appreciate it.

1 (Videotaped deposition playing resumes.)

2 (Videotaped deposition playing paused.)

3 MS. BROWN: Your Honor, if I may, that is the
4 first tab behind your binder, just so you can follow along.

5 THE COURT: These are marked 5A. Are these going
6 to be coordinated? Reference is made to 5.

7 MS. BROWN: Yes, later in the deposition, it's
8 determined it's 5A.

9 THE COURT: Thank you.

10 (Videotaped deposition playing resumed.)

11 (Videotaped deposition playing paused.)

12 THE COURT: If you will, stop at a stopping point.

13 (Videotaped deposition playing paused.)

14 THE COURT: Is this as good as any?

15 MS. BROWN: Yes, this is fine.

16 THE COURT: Very good.

17 And as you are aware, the Court does have a hearing
18 that it must come back to at 1:30.

19 MS. BROWN: Yes, I understand, Your Honor.

20 THE COURT: And I'll ask that you return at 2:45.

21 MS. BROWN: Thank you, Your Honor.

22 THE COURT: Do the parties have anything further
23 at this time?

24 If not, we'll be in recess until 2:45.

25 (A recess was taken at 12:10 p.m. until 2:46 p.m.)

1 (Proceedings resumed at 2:46 p.m.)

2 THE COURT: Good afternoon. Please be seated.
3 If you'll continue.

4 MR. WILKINSON: Your Honor, may it please the
5 Court, counsel and I were talking right after the break.
6 Would it be -- we would prefer if witnesses are excluded
7 during the testimony of other witnesses, whoever is on the
8 stand if that would be all right with the Court.

9 THE COURT: Counsel, if you've agreed to it,
10 that's fine.

11 MS. BROWN: I'm actually comfortable with having
12 experts. But if it's --

13 MR. WILKINSON: Yeah, that's -- actually, experts
14 is probably who we most would like to keep excluded. But we
15 figured let's just exclude everybody. That way we can --

16 THE COURT: So what is it that you've come to
17 agreement on?

18 MS. BROWN: At this point, we will agree to a
19 sequestration order.

20 MR. WILKINSON: Let's go ahead and -- whoever --
21 when there's a witness on the stand, no other witness can be
22 in the room, excluded, exclusion.

23 THE COURT: All right. State that again.

24 MR. WILKINSON: We would like -- whenever a
25 witness is on the stand, Your Honor, whether it's an expert

1 or lay witness, we would like all other witnesses in the
2 room to be excluded from the courtroom.

3 THE COURT: And that includes by deposition?

4 MR. WILKINSON: Yes, Your Honor. It probably --
5 this one doesn't matter. We're going to have to continue
6 with this. This is fine. I'm sure that Mr. Lapp does in
7 his deposition, so that's fine but --

8 MS. BROWN: He has not, Your Honor. But after Mr.
9 Wilkinson and I discussed it, I asked him to please not stay
10 in the courtroom. We hadn't discussed this prior to the
11 beginning of the trial so --

12 THE COURT: Is there any potential witness in the
13 courtroom now?

14 MR. WILKINSON: I don't believe so.

15 MS. BROWN: No, Your Honor.

16 THE COURT: And, so, the Court grants the motion.
17 I'll ask the parties to police it.

18 MR. WILKINSON: All right. Thank you, Your Honor.

19 MS. BROWN: And we will begin back with Ms.
20 Andreescu's testimony. Just so the Court is aware, there's
21 about two hours left. I will say this is far reduced from
22 the actual, I think it was seven hours of direct that we
23 additionally took from her. So we tried to shorten it as
24 much as possible to the relevant issues.

25 THE COURT: Well, thank heavens for that. So

1 please go ahead.

2 MS. BROWN: Thank you.

3 (Videotaped deposition of Stephanie Andreescu resumed.)

4 (Videotaped deposition paused.)

5 THE COURT: Sustained.

6 (Videotaped deposition resumed.)

7 (Videotaped deposition paused.)

8 MS. BROWN: Your Honor, if I could just be heard
9 for one moment here about this exhibit.

10 The document we used for the witness is behind U.S.
11 Exhibit 9. The first page is very hard to read and it's --
12 when we got it back from the court reporter, it was scanned.
13 So right behind it is an exact copy. It's a little clearer
14 to read but it's not actually the official exhibit. I just
15 wanted to clarify.

16 THE COURT: Thank you.

17 (Videotaped deposition resumed.)

18 (Videotaped deposition paused.)

19 MS. BROWN: I think just to speed this along a
20 little bit, what is behind 5C is the ones that Mr. Wilkinson
21 objected to based on legibility at the deposition.

22 I don't know if you're preserving that objection.

23 MR. WILKINSON: Yeah, I don't have any -- no
24 objection to 5B, Your Honor, but I still maintain it for,
25 for 5C just because the resolution is so poor.

1 THE COURT: What is 5C?

2 MR. WILKINSON: It's on the next tab there, Your
3 Honor.

4 THE COURT: And -- just one moment. And what is
5 the objection to 5C?

6 MR. WILKINSON: Just the legibility is so poor.

7 THE COURT: Let me ask, first of all, what does it
8 purport to show?

9 MS. BROWN: Your Honor, these are copies of the
10 aerial imagery and GIS layers that Ms. Andreescu reviewed
11 after returning from her site visit. I will agree that
12 these are very poor colored copies. There are additional
13 copies in the record. We didn't have them with us at the
14 deposition that day and we don't actually go through them.

15 So I, I will stipulate that we will provide them more
16 accurate copies to replace these. We can, we can -- I can,
17 if necessary, withdraw this Exhibit 5C and supplement it if
18 need be.

19 MR. WILKINSON: I don't know that they're, there's
20 any relevance to them. I don't have any problem with 5B
21 because they're at least legible enough to see what's in the
22 pictures, but 5C I don't see a whole lot of worth in them.

23 THE COURT: Well, as I understand it, 5C is being
24 withdrawn. And you may propose something to substitute
25 later with a live witness perhaps?

1 MS. BROWN: That's, that's correct, Your Honor.
2 And we'll go back and see if we actually need those in
3 there, but we just questioned her about 5B during the
4 deposition, so --

5 THE COURT: Very good. Thank you.

6 (Videotaped deposition resumed.)

7 (Videotaped deposition paused.)

8 MS. BROWN: Your Honor, I do go on to lay some
9 more foundation if you would like to proceed and then rule
10 on the objection or if Mr. Wilkinson would like to --

11 THE COURT: If there is more foundation, let's
12 hear it first and then take the objection.

13 MS. BROWN: Thank you.

14 (Videotaped deposition resumed.)

15 (Videotaped deposition paused.)

16 MR. WILKINSON: I was sort of planning my
17 objection, Your Honor. The issue, the issue really that we
18 have with, with these images that they put forward is not so
19 much that they're inauthentic representations of this
20 product that comes out of the State Addressing and Mapping
21 Board. But, obviously, the suggestivity [sic] of the blue
22 lines that are on this map as being prima facie evidence
23 that this is, in fact, a stream location is what we have the
24 biggest problem with.

25 We get into this with, with some of our testimony, our

1 expert testimony when we have our case in chief, you know.
2 Our understanding is that these, these blue lines are placed
3 here, or they're mapped here based on what the GIS program
4 identifies as the lowest elevation point topographically on
5 the map.

6 Now, we wouldn't dispute that if under the right
7 conditions of sufficient precipitation you're going to have
8 potentially surface flow in those locations. But just to
9 the extent that this is deemed taken or submitted as
10 evidence that everywhere there is a blue line on this map is
11 a stream, we would just ask the Court to note our objection
12 and give it the weight that your experience and
13 understanding would merit it.

14 THE COURT: Well, let me ask if I understand. Are
15 you suggesting that the blue lines on the map do represent
16 streams but not necessarily streams that are there on a
17 permanent basis?

18 MR. WILKINSON: I would dispute, Your Honor, that
19 they represent streams. I guess that's kind of a hot button
20 question as to what is -- what constitutes a stream.

21 I certainly would submit that everything in the Pad 4
22 area is obviously not a jurisdictional water. That's always
23 been our position. But they've, they've nevertheless
24 superimposed these blue lines here.

25 And, you know, it's -- the, the order of stream that is

1 represented in this image changes dramatically from the Pad
2 4 area down here to the north end of the, of the map which
3 is the actual perennial unnamed tributary of, of Neal Run.
4 And, yet, it's all shown on the map with the same category
5 of blue line.

6 And, so, it's just -- you've got more experience than
7 all of us combined in here, so I trust your judgment. I
8 just wanted to make the point that this -- these lines could
9 be taken -- you know, could be misleading if they weren't
10 understood to have been superimposed simply to represent
11 where the lowest point of elevation is on them and not
12 necessarily to indicate that there is flow or, or certainly
13 not all of the lines.

14 THE COURT: Let me hear from the Government.

15 MS. BROWN: Yes, Your Honor.

16 We are -- we're not offering this exhibit to
17 demonstrate Clean Water Act jurisdiction or to, to claim
18 that every SAMB map stream falls within the Clean Water Act
19 jurisdiction. However, we are using it to demonstrate that
20 the state has identified these areas as, as locations where
21 streams would flow.

22 And, so, it's just for the weight of the evidence the
23 Court would consider in identifying the fact that the state
24 had also mapped these reaches as well.

25 THE COURT: Well, it appears the preparer of the

1 map is presenting it as though the blue line does represent
2 a stream.

3 MS. BROWN: That is where the state has mapped
4 based on topography which is what Ms. Andreescu was
5 explaining based on a 1 to 49 - 4,800 scale resolution as
6 where flow would go. And, again, we can debate whether or
7 not they're streams or not. But based on the topography,
8 that's what the state has concluded.

9 MR. WILKINSON: And, and I would somewhat submit
10 that if that -- I would alter my objection then. That's
11 basically hearsay, Your Honor, because they're, they're
12 taking the representation of the State Addressing and
13 Mapping Board's contention that this is, in fact, a, quote,
14 stream as gospel and then submitting it.

15 THE COURT: Let me ask the Government what it
16 expects the Court to take from the exhibit insofar as it
17 shows the blue line.

18 MS. BROWN: Yes, Your Honor.

19 So I think it is an indication, first of all, that all
20 experts have relied on these mappings in terms of
21 identifying topographic features where water would flow.
22 And it is important to establish the reasonability -- and I
23 know that has somewhat changed since the summary judgment --
24 EPA's determination that there, there were streams at this
25 site. It's one factor in a, in a plethora of tools that the

1 agency as well as others, experts in this case have
2 considered in determining the presence of streams.

3 THE COURT: Well, EPA may say there were streams
4 at this site because this particular witness saw them at a
5 particular time. This seems to me that it's different from
6 that; that this is what the photograph shows. And the --
7 apparently there's been some enhancement that designates the
8 blue line stream. Is that correct?

9 MS. BROWN: So what, what happened, Your Honor, is
10 the, the State of West Virginia has created a, a GIS layer,
11 yes, that, that draws on, basically based on the topography
12 and the flight resolution of a 1:4,800 scale where they
13 would identify, identify streams. That's where the State of
14 West Virginia has mapped it.

15 THE COURT: If I understand what you just said,
16 the State of West Virginia says there's a stream where that
17 blue line is.

18 MS. BROWN: Yes.

19 THE COURT: How about it?

20 MR. WILKINSON: Well, Your Honor, the U.S.
21 Geological Survey -- if we were to set the USGS map right
22 next to it, the USGS map, as she testified earlier, does not
23 show that there is a stream there. Now, which of those two
24 proponent agencies has more qualification to identify such
25 things --

1 THE COURT: Wouldn't someone need then someone
2 from the West Virginia authority to come in and tell us how
3 it came to be that a stream as shown on their map is not
4 shown on the United States's geological map?

5 MS. BROWN: First, Your Honor, I think this falls
6 within the hearsay exception as a Government record. It's
7 produced by the state. We can, we can --

8 THE COURT: No, I'm asking you whether or not
9 there's someone that can say that; that, indeed, that's how
10 the state got it there and that's why it differs from the
11 U.S. geological map.

12 MS. BROWN: Well, I believe Ms. Andreescu will
13 explain the difference because USGS is mapped at a much
14 higher -- lower resolution.

15 THE COURT: Well, that's the 1:4,800 I think it
16 was.

17 MS. BROWN: Exactly, yes. This is at a lower
18 resolution, Your Honor.

19 THE COURT: And this is a much finer product.

20 Let me ask what you have finally to add, Mr. Wilkinson.

21 MR. WILKINSON: Well, we don't -- we certainly
22 don't contest that it's a, it's a higher resolution in the
23 sense that, you know, the scale is smaller. The ratio of
24 the scale is smaller.

25 However, the ratio of the scale of the photographs that

1 we showed you in our opening of the hayfield are much, much
2 more close than, than this. And that obviously doesn't show
3 a flowing water.

4 I mean, it's -- I won't belabor the point. I think
5 that there are, there are a number of exhibits that use this
6 GIS layer or something like it that are, that have been
7 submitted at various times in this litigation.

8 My only point is that, that it's -- it does not -- it
9 cannot be taken to represent some kind of definitive,
10 definitive proof that the location for their blue lines on
11 these layers necessarily means that there is a stream, and
12 certainly not a jurisdictional stream.

13 THE COURT: Well, what are you suggesting the blue
14 line means then?

15 MR. WILKINSON: It means that it is a -- it is --
16 it's -- my understanding from having sorted this out in some
17 other deposition testimony later or previously in this
18 litigation is that it represents the lowest, the lowest
19 elevation point on the ground.

20 THE COURT: And so, therefore, there must be water
21 in it.

22 MR. WILKINSON: Well, not, not necessarily, Your
23 Honor, because there's all kind of low points on the ground
24 that, that --

25 THE COURT: What I'm trying to get is the thinking

1 of the West Virginia authority that has done what I
2 understood you to say, simply put a blue line on that lower
3 elevation.

4 MR. WILKINSON: Right. And that's -- if that's --
5 as long as that's understood that it's just a, a line that
6 has been drawn to denote the lowest point in elevation on
7 the ground and doesn't necessarily serve as proof that there
8 is water there constantly or, or in sufficient degree to be
9 considered jurisdictional under the Clean Water Act, that's
10 really the only point we're trying to drive home here.

11 THE COURT: What's the Government say to that?

12 MS. BROWN: Well, Your Honor, I think we would
13 agree that just because something is mapped on SAMB does not
14 mean it falls within the Clean Water Act jurisdiction. This
15 is one piece of evidence that the United States is
16 presenting --

17 THE COURT: I'm not talking about jurisdiction.
18 I'm talking about water, --

19 MS. BROWN: Yes.

20 THE COURT: -- whether it's there or not. Are you
21 saying that because the blue line is there that the water
22 must be there, or are you saying what Mr. Wilkinson is
23 saying, that blue line represents the lowest point of
24 elevation and, as a consequence, there may be water there?

25 MS. BROWN: Yes. I do not dispute that.

1 THE COURT: I think you're in agreement.

2 MS. BROWN: Yes. And I would just note that the
3 USGS also maps streams and we can take those at what they're
4 worth if that's what we're just presenting here.

5 THE COURT: It is admitted.

6 MS. BROWN: Thank you.

7 (Videotaped deposition resumed.)

8 (Videotaped deposition paused.)

9 THE COURT: And, so, -- well, let's hold here a
10 moment. Do we have a further objection or is it withdrawn?

11 MR. WILKINSON: Well, given, given counsel's
12 confirmation that they don't necessarily -- they're not --
13 that they are not representing that just because there is a
14 blue line on this map that it is a jurisdictional water
15 under the Clean Water Act, I will withdraw the objection,
16 Your Honor.

17 THE COURT: All right. Then please go ahead.

18 Oh, before we do, what is 72?

19 MS. BROWN: I'm sorry, Your Honor. I should have
20 explained. During the deposition, opposing counsel was
21 appearing by video. And, so, I had sent him a binder with
22 all the exhibits I intend to use. Luckily, I am not using
23 all 72 here.

24 And, so, once they were marked, they were given a
25 defendants' exhibit number and that's the number that

1 they'll be in your binder. So this one is 34, but it was in
2 72 when Mr. Wilkinson first saw it.

3 THE COURT: Thank you. Go ahead.

4 (Videotaped deposition resumed.)

5 (Videotaped deposition paused.)

6 MS. BROWN: Excuse me, Your Honor. I just wanted
7 to let you know Exhibit 22, that's Page 13 of Exhibit 22.

8 (Videotaped deposition resumed.)

9 (Videotaped deposition paused.)

10 MS. BROWN: Your Honor, at this point I'd like to
11 move for the admission of all of the exhibits referenced
12 during Ms. Andreescu's deposition. Those are in your binder
13 with the exception of 5C.

14 MR. WILKINSON: No objection, Your Honor.

15 THE COURT: Admitted.

16 MS. BROWN: That's all we have for Ms. Andreescu.

17 MR. WILKINSON: Your Honor, we -- I have
18 designated the portions of Ms. Andreescu's deposition but I
19 didn't have a copy of the video to synchronize it to. I
20 don't know if it was the plan that we're going to continue
21 on here this evening. I wasn't sure if we were getting
22 ready to adjourn for the day. But I can certainly get
23 with --

24 THE COURT: I thought we were through with that
25 witness.

1 MR. WILKINSON: That's a reasonable conclusion,
2 Your Honor.

3 MS. BROWN: We appreciate your patience, Your
4 Honor.

5 THE COURT: Well, is there more from her or not?

6 MR. WILKINSON: Yes. I cross-examined her during
7 --

8 THE COURT: So you're going with cross now?

9 MR. WILKINSON: Well, I just -- it depends on how
10 you want to do it, Your Honor. I've got it designated in a
11 hard copy of the, of the deposition transcript. But,
12 unfortunately, that's all that I've got because I didn't
13 have the video to synchronize it to. But if you wanted
14 to -- I could get with the videographer and we could perhaps
15 begin first thing tomorrow with the cross-examination unless
16 you want to continue on.

17 THE COURT: Well, tell me how much longer this is.
18 I had it represented that this was two and a half hours and
19 we've been more than two and a half hours already. Is there
20 more?

21 MR. WILKINSON: Well, there's my portion of it. I
22 mean, it was maybe an hour plus at the time. And I haven't
23 designated all of it from that, from that period. But I
24 think the problem is that I don't know how long it would
25 take --

1 If I just gave you the transcript and showed you where
2 to pick up with the --

3 MS. BROWN: I'll just make clear this is not the
4 videographer. This is our paralegal.

5 MR. WILKINSON: Oh, okay, sorry.

6 THE COURT: Let me ask -- I take it what you're
7 saying is that the cross hasn't been edited yet.

8 MR. WILKINSON: Correct, Your Honor, correct.

9 THE COURT: But you've got in hard copy what you
10 want to present?

11 MR. WILKINSON: Yes, Your Honor.

12 THE COURT: And, so, if you were to present it
13 live through the witness, how long will it take?

14 MR. WILKINSON: I would imagine less than an hour.

15 THE COURT: It looks like you have a more
16 formidable supply than what I have.

17 MR. WILKINSON: Well, these are -- this is the
18 entire transcript of each of her depositions. And we've
19 also designated some portions from her prior depositions
20 during, during discovery.

21 THE COURT: Well, let's go back to editing. Do
22 you have that done yet or can it be done tonight?

23 MR. WILKINSON: No, Your Honor, I do not.

24 THE COURT: Can it be done overnight?

25 MR. WILKINSON: I'm not sure how long it will take

1 to accomplish that. I'm not sure. I would have to talk
2 with co-counsel to see how long it would take to get it
3 coordinated to, to have the designations in the hard copy
4 transferred as, as edited portions of the video. I'm not
5 sure how long --

6 THE COURT: Do you have a technician here to do
7 that?

8 MR. WILKINSON: I do not, no.

9 MS. BROWN: So our paralegals have the capability
10 of doing that. They are, they are busy, but we would offer
11 their, their services. It's just -- I don't know how much
12 you've designated. The United States would, would offer its
13 capabilities to, to produce the video once we have the
14 designations.

15 MR. WILKINSON: I think it starts on Page 207 and
16 it's not, it's not everything but, you know, it's basically
17 the last --

18 THE COURT: How many breaks do you have in it?

19 MR. WILKINSON: How many breaks, Your Honor?

20 THE COURT: You know, are there five or ten or 20?

21 MR. WILKINSON: There's quite a few. I mean,
22 it's -- it -- there are a number of breaks, Your Honor,
23 and -- but there's also a fair amount of fairly good
24 stretches.

25 It might, it might just be easier just to see what the

1 time signature is from the beginning of my cross until the
2 end. Honestly, I don't think that it was more than an hour.
3 If it was, it wasn't much. It might just be easier rather
4 than do the designations just, just run the entire
5 cross-examination.

6 MS. BROWN: I believe it starts at 184, line 18.

7 MR. WILKINSON: My first highlight is on 187 so --
8 but I skipped some stuff so --I don't want to try if it's
9 more than an hour but --

10 THE COURT: Do you have two or three substantial
11 breaks?

12 MR. WILKINSON: Yes, Your Honor. The problem is
13 that there's, there's some very short snippets where I'm
14 just hitting on her familiarity with certain things that
15 were already discussed. And then I wasn't really -- at the
16 time, I was highlighting because I wasn't really thinking of
17 it being transposed into the, into the video. So I'd just
18 kind of like to know -- it might be easiest, if it's not too
19 terribly long, just to run the cross.

20 THE COURT: Is any of that part that is excepted
21 testimony to which objections were posed?

22 MR. WILKINSON: There were some objections as I
23 recall. And I, I -- the one thing that is -- I guess now
24 that I think about it, we probably can't do the entire cross
25 because I was still -- at the time, our due process and

1 other claims were still alive so there was, there was still
2 certain lines of questioning that ran into that. But what's
3 highlighted is, is solely relevant to what our understanding
4 was over the weekend of what --

5 THE COURT: Well, let me ask, is the simpler thing
6 simply to hand up the redacted deposition?

7 MR. WILKINSON: I believe so, Your Honor. And
8 that's fine, that's fine with me if it's all right with you
9 all.

10 MS. BROWN: No objection.

11 THE COURT: I'd like to have it, though, quickly
12 so we can continue with this witness and then go on to the
13 next one.

14 MR. WILKINSON: It's right here, Your Honor, if
15 you want it.

16 THE COURT: Well, once again, it looks to me like
17 you're handing me an awful lot of material for an hour.

18 MR. WILKINSON: Right. This is all three of her
19 depositions, but the last one is, the last one is the one we
20 were just watching.

21 THE COURT: I just want the one that you're
22 interested in presenting.

23 MR. WILKINSON: Okay.

24 THE COURT: Is that the one in your hand?

25 MR. WILKINSON: Yes, Your Honor.

1 THE COURT: And then is some of that marked out?

2 MR. WILKINSON: It's not marked out, but the
3 only -- I only -- I'm pretty sure I only highlighted in this
4 one things that, that were relevant to what our
5 understanding of -- understanding was of what was left after
6 the summary judgment order on Friday. I can't swear I got
7 it 100 percent right.

8 THE COURT: Well, if it's agreeable, let's put
9 into evidence that which is left. But if there are parts of
10 it that the Government's not agreeing to, then that needs to
11 be marked out.

12 MR. WILKINSON: Yes, Your Honor. I will -- and I
13 don't believe that there is but, but -- do you want to look
14 it over? I know -- I meant to get her a copy of the e-mail
15 but I don't think that I did over the lunch break.

16 MS. BROWN: I just haven't had the opportunity to
17 review the designations. So if there is a possibility for
18 re-designation, I think that would be fine.

19 THE COURT: Well, suppose you do this. Let me
20 have the transcript that you're proposing to use. And then
21 on the assumption that if there are deletions, they won't
22 amount to much, then after perhaps I've read through it you
23 can tell me what those are and we'll cross them out.

24 MS. BROWN: I just don't have a copy of it yet.

25 MR. WILKINSON: Right. I will e-mail it to you as

1 soon as I get --

2 THE COURT: Now, then, is there redirect?

3 MS. BROWN: That's what I don't know yet. I
4 haven't had a chance to review these yet. So I don't know
5 if there's redirect. I'm not sure what segments have been
6 selected.

7 THE COURT: And you'll not know that until you
8 look at it this evening?

9 MS. BROWN: Correct, Your Honor.

10 THE COURT: And then once we finish with this
11 witness, what is next?

12 MS. BROWN: It depends if Your Honor wants to
13 continue today. We have Jeffrey Lapp here who's prepared to
14 testify. Otherwise, our next witness is arriving tomorrow
15 morning. And that will probably be Dave Walters and Todd
16 Lutte. But they have -- they're not quite here yet, so we'd
17 probably have Jeffrey Lapp testify now.

18 THE COURT: Well, we'll have Mr. Lapp in the
19 morning as well. And the Court will undertake to look at
20 this yet today. And then in the morning you can tell us
21 first thing what you're objecting to. And then we'll cross
22 that out of the transcript. I'll have to go back and see
23 what you want excised if there is anything.

24 MS. BROWN: Understood, Your Honor. Thank you.

25 THE COURT: I think that's going to be the

1 quickest way to do it.

2 Anything else this evening?

3 MR. WILKINSON: No, Your Honor, not from
4 plaintiff.

5 THE COURT: Do you want to hand that up now?

6 MR. WILKINSON: Yes, Your Honor.

7 THE COURT: When I run through this, it looks to
8 me like there's a good deal more than an hour. There are
9 four pages on each page. Towards the end there is
10 highlighted material. What's that represent?

11 MR. WILKINSON: Right, Your Honor. That's, that's
12 what I'm saying. Only the highlighted material is what I
13 have designated for your review out of my cross.

14 THE COURT: Well, then if that's the case, that's
15 not so much.

16 MR. WILKINSON: Right.

17 THE COURT: And so I was somewhat frightened when
18 I saw the size of it. But now that you tell me that, the
19 first half of it is largely unused.

20 MR. WILKINSON: Right. That's everything that we
21 just watched or the portions of it.

22 THE COURT: So I think that we have an
23 understanding about that. And we'll finish up with the
24 direct in the morning. And you can also tell me in the
25 morning, because you're going to have to read this tonight

1 too, and tell me what you object to, what should be
2 stricken. Then if the plaintiff resists that, we'll decide
3 it on the spot tomorrow.

4 So I think that covers us for this evening. And I
5 would simply ask whether or not you have anything further.

6 MR. WILKINSON: Your clerk asked the next -- the
7 last exhibit that was on our list was 206, although we
8 struck -- we amended and struck things out. Do you want it
9 labeled as an exhibit? 207 would be the next exhibit number
10 if you want to -- is that what you want to do is mark it as
11 Plaintiffs' 207.

12 THE COURT: Are you talking about this transcript?

13 MR. WILKINSON: Yes, Your Honor.

14 THE COURT: I don't think it -- it doesn't need to
15 be marked as an exhibit at all.

16 MR. WILKINSON: That's fine.

17 THE COURT: It's part of the evidence, the
18 transcript.

19 Anything else?

20 MS. BROWN: No, Your Honor, not from the United
21 States.

22 THE COURT: Very good. We'll see you back at 9:30
23 in the morning.

24 (Trial recessed at 5:14 p.m.)
25

REPORTERS' CERTIFICATE

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/s/ Catherine Schutte-Stant

August 14, 2017

Court Reporter

Date

/s/ Lisa A. Cook

August 14, 2017

Court Reporter

Date